

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re: :  
FLYNN, et al., : Docket #1:21-cv-02587-  
: GHW-SLC

Plaintiffs, :  
- against - :  
CABLE NEWS NETWORK, INC., : New York, New York  
: October 14, 2021

Defendant. :  
----- : MOTION HEARING

PROCEEDINGS BEFORE  
THE HONORABLE SARAH L. CAVE,  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For Plaintiff: STEVEN S. BISS, ESQ.  
300 West Main Street  
Charlottesville, Virginia 22903

For Defendants: DAVIS WRIGHT TREMAINE LLP  
BY: KATHERINE MARY BOLGER, ESQ.  
1251 Avenue of the Americas  
New York, New York 10020

Transcription Service: Carole Ludwig, *Transcription Services*  
155 East Fourth Street #3C  
New York, New York 10009  
Phone: (212) 420-0771  
Email: [Transcription420@aol.com](mailto:Transcription420@aol.com)

Proceedings recorded by electronic sound recording;  
Transcript produced by transcription service

INDEX

E X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re-Direct</u>	<u>Re-Cross</u>
----------------	---------------	--------------	------------------	-----------------

None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
-----------------------	--------------------	-----------	-----------	------------------

None

1

PROCEEDINGS

3

2

THE CLERK: Your Honor, this is in the matter of

3 Flynn et al versus Cable News Network, Inc., 21-civil-2587.

4

Counsel, please state your appearance for the  
5 record.

6

MR. STEVEN S. BISS: Judge, good morning. I'm  
7 Steve Biss. I represent the plaintiffs.

8

HONORABLE SARAH L. CAVE (THE COURT): Okay. Good  
9 morning.

10

MS. KATHERINE M. BOLGER: Good morning, your  
11 Honor. I'm Katherine Bolger; I represent the defendants.

12

THE COURT: Okay. Good morning to both of you.

13

So it's a little hard for all of us to hear with  
14 our masks on, but I'll try to do my best to be clear if you  
15 can do the same.

16

So we're here this morning on CNN's motion to  
17 dismiss the amended Complaint. And so, Ms. Bolger, would  
18 you like to start?

19

MS. BOLGER: I would, your Honor. Before I  
20 start, I have one sort of silly housekeeping matter.

21

THE COURT: Yes.

22

MS. BOLGER: I noticed last night while I was  
23 flipping through the exhibits nervously that the CMS tag  
24 had covered some of the exhibits. So I brought new copies.  
25 I've already given Mr. Biss a copy, but I wondered if I

1 PROCEEDINGS

4

2 could just hand these up to you all.

3 THE COURT: That's fine. Thank you for noticing  
4 that.

5 And, actually, then, before you get -- since we're  
6 talking about exhibits, before you get started, so I don't  
7 interrupt your flow, in footnote two of the amended  
8 complaint, the Lynns allege that on July 7, 2020, CNN  
9 published the video. And then there are two links there,  
10 and it refers to an accompanying article written by  
11 Marshall Cohen. I didn't see that Cohen article among the  
12 exhibits. Did I miss it or --

13 MS. BOLGER: No, your Honor, we -- it's not the  
14 reported issue in the dispute, and we did not rely on that.

15 THE COURT: Okay.

16 MS. BOLGER: Although we would take the position  
17 that it, like everything else, is incorporated in the  
18 complaint.

19 THE COURT: Okay. I just wanted to make sure I  
20 hadn't missed something.

21 Okay, go ahead, Ms. Bolger.

22 MS. BOLGER: Your Honor, this is a defamation  
23 action that arises out a CNN report in which the plaintiffs  
24 are not named, are not discussed and don't speak and aren't  
25 the subject of the report. In fact, they're only shown in

1 PROCEEDINGS

5

2 two seconds of a clip that plaintiff Jack Flynn himself had  
3 posted previously on Twitter. In those few seconds of the  
4 clip Jack Flynn's brother, General Michael Flynn, recites  
5 the QAnon's words, "Where we go one, we go all."

6 THE COURT: Can I just stop you there? So you say  
7 that Mr. Flynn himself, Jack Flynn, posted the video? I  
8 know that the amended complaint alleges that General Flynn  
9 posted the video, but you're saying that Jack Flynn himself  
10 also posted the video to Twitter?

11 MS. BOLGER: He did, your Honor. And, actually,  
12 Exhibit 9, which I just handed up to you, is Mr. Flynn's  
13 Twitter. And you'll see not only did he post the video,  
14 but he says, "#take the oath happy fourth of July," and  
15 then he lists a bunch of other Twitter handles. So that is  
16 Jack Flynn's Tweet -- it's from July 5, 2020 -- of the  
17 video that is of Mr. Flynn and his family saying the words,  
18 "Where we go one, we go all."

19 THE COURT: Well, this is a re-Tweet of General  
20 Flynn's Tweet, right?

21 MS. BOLGER: Yes.

22 THE COURT: Okay. And is the whole video  
23 attached? This is just an image, but obviously, it's a  
24 printout, so maybe that's why I can see; but was it the  
25 whole video attached or just the image?

1

PROCEEDINGS

6

2

MS. BOLGER: Yes, your Honor. And then,

3

actually, in the amended complaint on page -- one  
second -- page 13, this is the plaintiff's own complaint.

5

You see there's a printout, and then the sort of fourth  
Tweet down in the image, he actually asked that it be re-  
Tweeted again, Jack Flynn, the last thing.

8

THE COURT: Sorry, the one on page 13?

9

MS. BOLGER: So page 13, the last Tweet in the  
10 story --

11

THE COURT: Oh, I see, yes.

12

MS. BOLGER: -- it says, "Joe, can you repost the  
13 oath we took on the Fourth?"

14

THE COURT: Got it. Okay. Thank you.

15

MS. BOLGER: So from this fleeting appearance,  
16 the plaintiff has concocted a defamation claim in which he  
17 says CNN accused him of being a racist, an extremist, an  
18 anti-Semite and a bunch of other things. But the Court  
19 should dismiss the complaint because the CNN report doesn't  
20 say any such thing. In fact, the only thing the report  
21 actually says about the Flynns is that they were standing  
22 next to their brother Michael. And even if your Honor  
23 construes the report as containing some kind of defamatory  
24 meaning that the Flynns are associated with QAnon, well,  
25 your Honor, the plaintiffs' own complaint establishes that

1 PROCEEDINGS

7

2 they themselves have probably associated themselves with  
3 QAnon.

4 THE COURT: Well, that's "publicly associated  
5 with"; is that equal to "follower," which is what the CNN  
6 video says?

7 MS. BOLGER: Well, the CNN video doesn't say  
8 that, your Honor. They --

9 THE COURT: Well, the chyron says "QAnon  
10 follower," and it has their picture on it. So it's  
11 labeling them a QAnon follower.

12 MS. BOLGER: Well, no, your Honor; what the CNN  
13 chyron in that one freeze frame of that one one-and-a-half-  
14 second of the larger report says is CNN goes inside a  
15 gathering of QAnon followers, so it doesn't actually say  
16 they are QAnon followers. And --

17 THE COURT: Wait, wait, wait, wait. How can you  
18 say that?

19 MS. BOLGER: Well, it says they go inside a  
20 gathering. Right? It doesn't say these are QAnon  
21 followers; it just says they go inside a gathering. I just  
22 wanted to make sure I was correctly quoting the sentence.

23 THE COURT: Yes, but that's a picture. And right  
24 below the picture it says, "QAnon followers." How is that  
25 not calling them QAnon followers?

1

PROCEEDINGS

8

2 MS. BOLGER: Well, your Honor, because it's one  
3 frame of a full report. And the law is very clear in Rhode  
4 Island and in New York that in assessing defamatory  
5 meaning, the Court has to look at what CNN actually  
6 distributed, not what the plaintiff chooses to freeze  
7 frame, but what CNN actually distributed. And here, taking  
8 the context as a whole, the report is actually not about  
9 the plaintiffs at all. The report actually talks about a  
10 QAnon gathering in Arizona, which is, your Honor, why I'm  
11 mentioning the word "gathering," because the report is  
12 actually about a gathering, a specific gathering, not this  
13 one.

14 And in the report, Donie O'Sullivan, who's the CNN  
15 commentator, says to the audience that there's this QAnon  
16 following, and he shows someone playing the guitar and  
17 singing the song, "Where we go one, we go all." And then  
18 he says that that QAnon slogan has been endorsed by Michael  
19 Flynn. And after he says that, they show this quick clip,  
20 and then it goes back to talking about Michael Flynn's  
21 refusal to disavow QAnon and President Trump's refusal to  
22 disavow QAnon.

23 THE COURT: Right.

24 MS. BOLGER: That's what the report says. There  
25 is no precedent for simply basing a defamation claim on one

1

PROCEEDINGS

9

2 frame; you have to look at the report as a whole.

3 THE COURT: Well, right. But the report -- I've  
4 watched the video many times, and the report is various  
5 clips of that meeting, and there are pictures of the people  
6 at the meeting. There are people at -- and then there are  
7 clips of the January 6 riot, and there are other clips of  
8 various people. And the tone of the whole report is these  
9 people, everybody that we're showing you is a QAnon  
10 follower. So isn't that the context of the whole report,  
11 that anybody you're seeing is a QAnon follower?

12 MS. BOLGER: Well, no, your Honor; you're  
13 supposed to look at the words that are actually contained  
14 in the report, not the context -- not the way the plaintiff  
15 chooses to characterize it. The report itself discusses  
16 only that Michael Flynn said these words and has supported  
17 QAnon. That's the only context that this is used. There's  
18 no connection. There's none of the connective tissue that  
19 your Honor is talking about, you know, implying that these  
20 people are engaging in this behavior. None of that  
21 connective tissue is in the report. It's in the complaint,  
22 but it's not in the report, and you should focus on --

23 THE COURT: But then your whole defense is, well,  
24 they are QAnon followers, so it's okay that we called them  
25 QAnon followers. So you're contradicting yourself.

1

PROCEEDINGS

10

2

MS. BOLGER: No, your Honor, we're not contradicting ourselves. The report doesn't say they're QAnon followers. The only thing the report says about the plaintiffs is that they were standing next to their brother when he said, "Where we go one, we go all." That's the only thing the report says.

8

If your Honor chooses to disagree with me and believes that the report associates them with QAnon, then I do think, your Honor, if you were to accept that interpretation, which to be clear, I don't think you should, they are -- they have associated themselves with QAnon in several ways that I can show you in the complaint. Right? Not only did Mr. Flynn say the -- and Mrs. Flynn say the words, "Where we go one, we go all," and post that video to Twitter, to re-Tweet it to Twitter so that he could get hundreds of thousands more followers, but also throughout the complaint the plaintiff himself selected Tweets that show his affiliation or their association with Q. And I can just pop through --

21

THE COURT: Again, you're equating the word "follower" with "association" or "affiliation." And I'm not sure that that's the right thing. I'm not sure a juror would equate all three of those verbs as the same thing.

25

MS. BOLGER: Well, your Honor, in a defamation

1

PROCEEDINGS

11

2 case the literal truth is not required. Right? It is not  
3 the case that your Honor needs to parse "follower" to mean  
4 one thing. Substantial truth is required. Right? And in  
5 the *Tannerite* case and the *Cabello-Rondon* case what the  
6 Second Circuit actually said was that the plaintiff had to  
7 plead facts that establish material falsity and substantial  
8 truth, which is a squiffier -- that's a legal term --  
9 definition than literal truth -- establishes the truth  
10 here. And here, your Honor, it's impossible to suggest  
11 that the substantial truth of the QAnon allegation is not  
12 established when the plaintiff himself Tweets out -- and  
13 it's in the complaints --

14

THE COURT: Page 13 and 14.

15

MS. BOLGER: -- at page 15, a giant Q that says,  
16 "Where we go one, we go all," and says, "If this means you  
17 believe in the Constitution and equal justice under the  
18 law, then this works for me." Your Honor, the substantial  
19 truth is that Jack Flynn has willingly chosen to associate  
20 himself with QAnon. There's no question about that. I can  
21 read all of the other ones that are in here or Exhibit 12,  
22 my sort of one in Exhibit 12 that I think is so persuasive.

23

THE COURT: But they also say we're not QAnon  
24 followers. They allege that. I have to assume that that's  
25 true.

1

## PROCEEDINGS

12

2

3 because --

4

THE COURT: I do. Well, it's a motion to dismiss.

5

I have to take it as true that they say they're not QAnon  
6 followers.

7

MS. BOLGER: The *Iqbal* decision itself actually defines "plausibility" in a way that is inconsistent with what Mr. Biss argues in his papers. The *Iqbal* decision itself actually defines "plausibility" and it says that the Court should assess plausibility by, quote, "drawing on it is judicial experience and common sense." Right? That's what *Iqbal* says. So you are not required to just blindly accept what's in the complaint; you're allowed to draw on your judicial experience and common sense.

16

And more than that, your Honor, there's a case we cited in the brief, the name of which I will get in one second, that says when allegations in a complaint are actually contradicted by other allegations in the complaint, you're not obligated to rely on them. And here, your Honor, that's what's happening here. First of all, your Honor, the plaintiff says, well, I just said this because it was a family gathering, and I said it out of support for my family. Well, the plaintiffs' own complaint contradicts that. The last several pages of the complaint,

1

PROCEEDINGS

13

2 pages 19 through 23, have Tweet after Tweet after Tweet by  
3 other people using the hashtag "take the oath" and  
4 associating it with QAnon. Right? That contradicts  
5 plaintiffs' own allegation that this was just a family  
6 thing to say. The article, in footnote four, The  
7 Washington Examiner story, which was written at the time of  
8 the original posting, the July 4th video, has a Washington  
9 Examiner article which itself says, "This is the QAnon  
10 oath. Take the oath of the QAnon movement." Everything  
11 the plaintiffs are saying is contradicted by their very own  
12 exhibits. And under those circumstances, your Honor,  
13 you're not required to take the plaintiffs' representation  
14 as truthful.

15

THE COURT: So this case is a little bit unusual  
in that, as you say, CNN doesn't state the words, "The  
Flynn's are QAnon followers," but there's their picture and  
then there's the chyron below it. What's the closest case  
here, from your perspective, as that not being a statement?  
So what's your strongest case for me to believe that CNN  
did not state that the Flynn's were QAnon followers based on  
the chyron and their image?

23

MS. BOLGER: I think, your Honor, the closest  
cases are the -- the *Marcil* case, which is actually a Rhode  
Island Court of Appeals case.

1

PROCEEDINGS

14

2 THE COURT: Yes.

3 MS. BOLGER: In the *Marcil* case what the Court  
4 says is you're not supposed to add innuendo or any kind --  
5 you're not supposed to introduce new matter or enlarge the  
6 meaning of words to give to language a construction it will  
7 not bear. What the plaintiff is saying is that you have to  
8 ignore the evidence of what the report actually says and  
9 impose this idea that they're QAnon followers. I don't  
10 think, your Honor, that it has that meaning.

11 There are all kinds -- the *Bray* case in Rhode  
12 Island is a case that says you have to construe this broadly.  
13 The *Mann v. Evel* case, which is a New York Court of Appeals  
14 case, which we didn't cite because at the moment we're  
15 agreeing Rhode Island law applies, says that you have to  
16 construe the subheadline in connection with the much larger  
17 argument. And there's case after case in New York, which  
18 just frankly has more defamation law than Rhode Island because  
19 we have more --

20 THE COURT: Yes, I've noticed.

21 MS. BOLGER: -- organizations. Right? So there is  
22 the -- in this court there was the *Cummings* case that was just  
23 decided. In this court there was the *BY* case that was just  
24 decided. These are all cases where what the court says is you  
25 can't just base it on one thing; you have to take a step back

1 PROCEEDINGS 15

2 and look at the report. So that's the line of cases, your  
3 Honor, that I think give us the strongest support for the fact  
4 that it doesn't convey the [indiscernible].

5 THE COURT: Okay. Let's talk about the limited-  
6 purpose public figure versus private figure. So you allege  
7 that Jack Flynn is a limited-purpose public figure, at  
8 least, if not a public figure. How does just having a  
9 famous brother and Tweeting get you out of being a private  
10 person?

11 MS. BOLGER: So it wouldn't, your Honor, and I  
12 didn't argue that it does.

13 THE COURT: Okay.

14 MS. BOLGER: So the regime for establishing a  
15 limited-purpose public figure, which was actually created  
16 in *Gertz v. Robert Welch*, is the idea that a person becomes  
17 a public figure by stepping into a preexisting controversy  
18 and seeking to influence its outcome. That's the Gertz  
19 test, and there's a Rhode Island case we cited in the  
20 [indiscernible].

21 Your Honor, here there was, of course, a  
22 preexisting public controversy regarding QAnon and,  
23 frankly, Michael Flynn himself. Jack Flynn stepped into  
24 that controversy by doing a couple of things. One is you  
25 can tell from many of the Tweets he was an aggressive

1 PROCEEDINGS 16  
2 supporter of his brother and his brother's dismissal -- the  
3 dismissal of the charges against his brother. He also was  
4 an aggressive promoter of the video of him saying, "Where  
5 we go one, we go all." That's at page 13 of the complaint,  
6 your Honor. That's where he asks to repost the oath  
7 video -- that's what he calls it, "the oath video." In  
8 addition, he's an aggressive seeker of eyeballs. Right?  
9 He goes from 100,000 Tweets to more than 200,000 Tweets in  
10 one day by promoting his "Where we go one, we go all,"  
11 video. And we cited cases in our brief, your Honor, where  
12 increasing -- making publications that increase your  
13 Twitter promotion actually make you into a public figure.  
14 Those are in our brief.

15 THE COURT: But his -- the number of his followers  
16 is not in the complaint, though, right?

17 MS. BOLGER: No, your Honor, but you can take  
18 judicial notice of it.

19 THE COURT: Okay.

20 MS. BOLGER: I mean, he relies heavily on his  
21 Twitter feed. It's integral to his complaint and --

22 THE COURT: He relies on these Tweets. He doesn't  
23 rely on his whole feed.

24 MS. BOLGER: Well, but in the -- first of all, I  
25 think under the *Chambers* case, which is a Second Circuit

1 PROCEEDINGS 17

2 case, the Court would say that anything that he relies on  
3 in the complaint becomes part of the complaint. And --

4 THE COURT: Right. Which is --

5 MS. BOLGER: And there's Judge Abrams'  
6 [indiscernible] a fantastic Judge Abrams' case, which  
7 begins with a G -- hold on one second -- sorry. And in  
8 that case Judge Abrams actually takes judicial notice of  
9 Tweets other than the ones that are actually put into the  
10 complaint by the plaintiff because those Tweets are  
11 integral to the complaint and because the plaintiff can't  
12 be allowed to say some things are in it but some things are  
13 not. So there is actual precedent for relying on those  
14 Tweets.

15 THE COURT: Okay. All right, so then let's talk  
16 about Mrs. Flynn. So, clearly, she's a private figure;  
17 there's no dispute about that.

18 MS. BOLGER: Not at the moment, your Honor.

19 THE COURT: How hasn't she at least alleged  
20 negligence -- we're just talking about Rule 8 here, and  
21 there are several obligations, paragraph 20,  
22 paragraph 23(c), where she alleges, for example, CNN could  
23 have called the Lynns or taken other steps to confirm?

24 MS. BOLGER: Because none of those actually would  
25 constitute negligence. So, first of all, your Honor, her

1

PROCEEDINGS

18

2 primary argument that there is -- that the defendant acted  
3 with negligence is two-fold. Her primary argument is if  
4 they had looked at my Twitter feed, they would have known I  
5 wasn't as QAnon supporter. And her secondary argument is  
6 they're a wing of the Democratic party, and they act with  
7 bias.

8

I'll take those in reverse order. The bias  
argument, of course, has been rejected by every single  
Court that's ever heard it, most recently, in the *Arapaho*  
case in DDC and the *Dershowitz* case in the Southern  
District of Florida.

13

As to the first part, that they already went back  
and looked at her Twitter feed and would have known that  
she wasn't a QAnon supporter, well, that's completely  
undercut by Exhibit 13 in which she Tweets and re-Tweets  
QAnon slogans. Right? So, in fact, had CNN gone back and  
looked at Ms. Flynn's Twitter feed, it would have confirmed  
the truth of the allegedly defamatory implication that  
plaintiff seeks to graft onto this one report.

21

THE COURT: Right. I thought that bias -- you  
know, certainly bias or a failure to investigate is not  
enough for actual malice. But for negligence, you're  
saying that bias isn't enough for negligence?

25

MS. BOLGER: Bias is not enough for negligence.

1 PROCEEDINGS

19

2 THE COURT: Okay.

3 MS. BOLGER: Negligence is a departure from a  
4 standard of care. A standard of care is not  
5 [indiscernible] bias -- objective standard of care.

6 THE COURT: Okay. I'm sorry. I keep interrupting  
7 you. Go ahead.

8 MS. BOLGER: That was going to be it on the  
9 negligence issue --

10 THE COURT: Okay. Yes.

11 MS. BOLGER: I think the only other claim to  
12 discuss is the false -- oh, your Honor, there is the fact  
13 that the plaintiff didn't technically comply with the Rhode  
14 Island pleading requirements for defamation per se, and  
15 then the requisite special damages. That is a quirk of  
16 Rhode Island law. If it was a New York law, I probably  
17 wouldn't be making the argument, your Honor. But the  
18 allegations in the complaint of this sort of nebulous bad  
19 acting is insufficient to --

20 THE COURT: Hold on one second. Hold on one  
21 second. Okay, just hold on one second. We're going to  
22 have to fix the recording. So if you can just bear with  
23 us, and then I'll have you repeat the last thing that you  
24 just said.

25 It's going now. Okay. So you were talking about

1 PROCEEDINGS 20

2 special damages.

3 MS. BOLGER: Yes. So, your Honor, the  
4 requirements of the Rhode Island law are that you have to  
5 plead defamation per se, which is to say defamation which  
6 harms you in your business. And if you don't plead  
7 defamation per se, you have to plead special damages. Here  
8 there's no allegations in the complaint that the  
9 particularly alleged defamatory meaning that the plaintiff  
10 seeks to ascribe to the CNN report damaged the plaintiffs  
11 in their business. It's unclear how it could damage your  
12 business as a seafood salesman in Rhode Island or as a  
13 homemaker and hairdresser. And more than that, there's  
14 insufficient allegations of special damages. The law is  
15 very clear that special damages need to be enumerated  
16 financial harm. There are no enumerated financial harms in  
17 the complaint; they're just not there.

18 So if even if, your Honor, you disagreed with on  
19 everything else, fundamentally, he has not pled the claim  
20 of defamation per se with special damages.

21 THE COURT: Okay. Great.

22 MS. BOLGER: And the last thing, your Honor, is  
23 there is an intentional -- there's an invasion of  
24 privacy/false light claim. False light, actually, of  
25 course, doesn't exist in New York. But it is true in the

1 PROCEEDINGS 21  
2 rest of the world that false light exists. But false light  
3 is bounded by the same things as the tort of defamation:  
4 substantial truth and actual malice. And the failure to  
5 plead either of those dooms your false light claim. So,  
6 your Honor, here we believe the claim should be dismissed.

7 THE COURT: Okay. Thank you.

8 All right, Mr. Biss, the floor is yours.

9 MR. BISS: Judge, good morning.

10 THE COURT: Good morning.

11 MR. BISS: May it please the Court, I'm Steve  
12 Biss, and I represent the Lynns.

13 Judge, I'm going to respond to the Court's  
14 questions and Ms. Bolger's responses. Of course, I'd be  
15 happy to answer any other questions. We have, as the Court  
16 knows, both parties filed detailed briefings.

17 THE COURT: Yes.

18 MR. BISS: With regard to the -- I'll start in the  
19 reverse order; I'll start with the issue of damages. So  
20 Jack Flynn is a businessman. And the complaint clearly  
21 alleges that the statements affect him or impute to him an  
22 unfitness to perform his duties and responsibilities as an  
23 executive of a seafood company or -- it doesn't matter,  
24 seafood company or any other company, it doesn't matter.  
25 He's a businessman. And with great respect to my

1

PROCEEDINGS

22

2 colleague, I would suggest to the Court that it is obvious  
3 if somebody gets labeled as being a follower of an  
4 extremist group, that's going to impact their ability  
5 to function an executive of a company. There are  
6 plenty of examples of executives being fired simply  
7 because they went to the January 6th or they  
8 participated in going to the Capitol on January 6th,  
9 plenty of examples. So that's with regard to Jack Smith  
10 [sic].

11

With regard to Mrs. Flynn -- Jack Flynn -- with  
regard to Mrs. Flynn, who is clearly a private figure, the  
Gertz case controls. Gertz is the case. In Gertz -- I  
would just commend the Gertz case to the Court. You've  
probably read the Gertz case.

16

THE COURT: Yes, I have.

17

MR. BISS: It talks about what's required to  
prove in a private-figure case or a private-individual  
case. And special damages is not limited, as my colleague  
pointed out, is not limited to financial harm; it includes  
mental anguish, it includes insult, injury, humiliation,  
embarrassment. The Rhode Island Supreme Court has adopted  
that Gertz definition of actual injury, and that's what  
controls here. And Mrs. Flynn has clearly alleged that  
she suffered actual injury as a result of the publication.

1 PROCEEDINGS 23  
2 And I would add this one fact. Shortly after this episode  
3 aired, she gets a text from her girlfriend, her next-door  
4 neighbor, that says that we saw you on CNN. And we allege  
5 in the complaint that the publication of these facts have  
6 caused both Flynns -- have caused actual injury to both  
7 Flynns. So under *Gertz* we've satisfied the pleading  
8 standard for special damages because special damages are  
9 not simply limited to financial harm. A homemaker, if you  
10 believe that a homemaker can't suffer harm by being accused  
11 of being a neo-Nazi or any other false or defamatory  
12 concept, I take great exception to that comment. Just  
13 because she's working at home doesn't mean that her  
14 reputation can't be soiled and wrecked by falsely  
15 attributing to her an affiliation that she doesn't have.  
16 So I would submit to your Honor we have satisfied the *Gertz*  
17 pleading standard for actual injury for Mrs. Flynn, and we  
18 have pled defamation per se for the reasons stated in our  
19 brief. And we cite a number of cases in our brief -- I  
20 won't go into those.

21 With regard to --

22 THE COURT: And I just pause you there for one  
23 second? Because --

24 MR. BISS: Yes, your Honor.

25 THE COURT: -- I think this question does relate

1

PROCEEDINGS

24

2 to damages. So in paragraph 19, I think it is, the Lynns  
3 allege that they received threats, I believe it was. I  
4 assume that's part of your allegation of damages. Is there  
5 anything you can elaborate -- I think it's 19(d). Sorry.

6

6 MR. BISS: Sure. It is, Judge, it's by almost  
7 definition one of the classic ways that you can prove  
8 actual injury. So injury to reputation is measured by the  
9 value of your reputation before the publication measured by  
10 the value of your reputation after. So what you have to  
11 look at is the impact of the defamatory statements on your  
12 reputation. The fact of the matter is the Lynns got death  
13 threats, the Lynns got threats of bodily harm as a result  
14 of being falsely affiliated with QAnon or being QAnon  
15 followers. That's actual injury. That's injury to your  
16 reputation, that's injury to your name. And so the Court's  
17 correct to point that out, that we do allege here that  
18 there are facts in the complaint that show that they did  
19 suffer a tangible injury. For instance -- and this happens  
20 a lot with these nationwide publications. There are -- and  
21 I say this with great respect -- there are a lot of crazy  
22 people out there in the world. And part of the danger here  
23 of associating somebody with QAnon or associating them with  
24 neo-Nazis or other similar things, Judge, is that somebody  
25 shows up on your front step. These phone calls and these

1 PROCEEDINGS 25

2 voicemails are devastating to people.

3 THE COURT: So they received -- did people show up  
4 at their house --

5 MR. BISS: No. Nobody showed up at their house.

6 That --

7 THE COURT: -- actually? Did they receive --

8 MR. BISS: -- was just an analogy. But they did  
9 receive death threats, they did receive phone calls. And  
10 we allege that in the complaint because this is what causes  
11 them enormous emotional and psychological injury is to have  
12 them threatened and then -- because you don't know what's  
13 going to happen next.

14 THE COURT: Right.

15 MR. BISS: If you're a public figure -- and I  
16 represent certain public figures -- if you're a public  
17 figure, you have the protection of the capitol police. Or  
18 if you're a member of the court, you have the protection of  
19 the federal police. The Flyns don't have any protection.  
20 So this was devastating to them. And those are facts that  
21 support the allegation of damages in this case.

22 THE COURT: Okay. So they received phone calls.  
23 Did they receive text messages or anything in the mail or  
24 anything else that would be additional facts supporting  
25 these threats, as opposed to just the simple assertion that

1 PROCEEDINGS 26

2 there were threats? Is there anything else you can tell  
3 the Court about specifics on those?

4 MR. BISS: I can't without getting into the  
5 specific evidence, without producing in discovery the  
6 voicemails and those types of things, I can't -- I  
7 haven't --

8 THE COURT: Categorically were there -- what form  
9 did the threats come in? You said phone calls. Were there  
10 also text messages or anything in the mail or anything in  
11 person --

12 MR. BISS: Judge, I can't represent to you that  
13 there were text messages or mailings. I can only tell you  
14 that there were telephone calls.

15 THE COURT: Okay. Thank you.

16 MR. BISS: And I would just -- just to circle back  
17 on that, to come full circle, I think that's enough. I  
18 don't think I have to -- I mean, I don't think -- there's  
19 no case I know of and no rule I know of that says that in  
20 order to be able to allege damages, you had to have gotten  
21 voicemails plus text messages --

22 THE COURT: I wasn't suggesting that there was. I  
23 was just trying to find out -- you said -- the complaint  
24 says threats; I was trying to find out how they arrived.  
25 That's all.

1

## PROCEEDINGS

27

2

MR. BISS: Yes, your Honor.

3 On the issue of negligence, again, I disagree with  
4 my colleague. The fact of the matter is it would have been  
5 pretty simple to pick up the phone -- and this is what they  
6 always do -- they pick up the phone -- they've already  
7 written their article, they pick up the phone, they call  
8 the Flynns, and they say, Do you have any comment? We're  
9 going to publish the article in two hours or we're going to  
10 public the broadcast, the segment in two hours. The fact  
11 is they didn't call. And that is negligence per se. For a  
12 reporter not to contact the source of an article or the  
13 source of a broadcast, that's enough to -- that fact alone.

14

The other thing is -- and I think your Honor  
15 pointed this out -- there was no effort to investigate  
16 other than apparently Jack Flynn re-Tweeted the video --  
17 and I'll get to that in a moment -- no effort to  
18 investigate whether or not the Flynns were QAnon followers.

19

So for Mrs. Flynn, there's no question that the  
20 negligent standard has been satisfied. And for Jack Flynn  
21 there's no question, based on those facts alone, there's no  
22 question that the negligent standard, which is a very low  
23 bar, the negligent standard -- it's normally -- it's not my  
24 experience to have that particular aspect of the claim  
25 challenged. But I will say in this case the fact that they

1

PROCEEDINGS

28

2 didn't call the Flynns is enough to show that they were  
3 negligent.

4                 Jack Flynn, it's alleged that he is a limited-  
5 purpose public figure. We disagree with that. He's a  
6 private individual. We allege that he's a private  
7 individual. Of course, it's the defendant's burden of  
8 proof to show that he's something other than a private  
9 individual. Ms. Bolger acknowledged, I think she confirmed  
10 to the Court, that simply Tweeting and being the famous  
11 brother of a -- having a famous brother is not sufficient.  
12 But she really didn't add anything more to that. She  
13 suggested that he was an aggressive supporter of his  
14 brother. Of course, I mean, the Flynn family aggressively  
15 support each other. They are a very tight family. They're  
16 a large family. But loving your brother or aggressively  
17 supporting your brother in an extremely difficult long-term  
18 prosecution does not make you a public figure. I don't  
19 know of any case that would show that.

20                 She also said that he re-Tweeted the video.  
21 Judge, that doesn't make you a public figure. That would  
22 make everybody a public figure. Everybody who ever  
23 repeated that, re-Tweeted that video, would make them a  
24 public figure. That does not make Jack Flynn a public  
25 figure.

1

PROCEEDINGS

29

2                   And then the other thing she said was that he  
3 promoted the video. And I think what she's referring to is  
4 where he says to his brother Joe -- and it's in the  
5 complaint -- go ahead and re-Tweet it or reshare it.

6                   THE COURT: Right.

7                   MR. BISS: Judge, that gets me -- I just want to  
8 address that for a moment. That's back in July of 2020.  
9 Okay? That has nothing to do with QAnon. When Jack Flynn  
10 says re-Tweet the video, it has nothing to do with QAnon.  
11 Ms. Bolger's taking Jack Flynn's re-Tweet in 2020  
12 completely out of context to this case. It has nothing to  
13 do with being a QAnon follower. He's not saying, "I'm a  
14 QAnon follower. Re-Tweet this." He's just re-Tweeting  
15 because it is -- it supports his brother Mike. And that's  
16 what we allege in the complaint. And there's nothing more  
17 alleged here. Being an aggressive supporter of your  
18 brother, re-Tweeting something that you believe would help  
19 your brother, and telling your other brother to share it  
20 with somebody, I would respectfully submit doesn't make you  
21 a limited-purpose public figure, at least given the  
22 backdrop of where we are today in the proceedings. Okay?  
23 Where we are today is the 12(b) (6) stage. Of course, the  
24 defendant has the burden of proof, and they might -- in  
25 discovery they might discover that Jack Flynn has done

1 PROCEEDINGS 30  
2 more. I doubt they will, but they may. Or they might  
3 find, as I've had in other cases, that he did less. We  
4 don't know. You don't know what it is. But on these facts  
5 and at this stage of the proceeding, there is -- given that  
6 the Flynns have alleged that they are private individuals  
7 specifically, that part of the motion should be denied.  
8 And, obviously, they can revisit it on summary judgment if  
9 they develop any facts.

10 THE COURT: Can I just pause you for a second? So  
11 in the complaint there are a couple of places that  
12 reference -- obviously, there are Tweets that are  
13 screenshotted and included in the complaint, but there are  
14 several places where the complaint references the Flynns'  
15 Twitter account or their Twitter feed generally. And they  
16 say if CNN had just looked at their Twitter feed, they  
17 would have seen that they were not QAnon followers. Why  
18 don't that open the door to me looking at everything that  
19 Ms. Bolger handed up to me and the rest of their archived  
20 Twitter feeds?

21 MR. BISS: Well, again, Judge, I think their --  
22 she goes much further than Jack Flynn's Twitter feed. And  
23 with regard to Leslie Flynn, what they have attached as an  
24 exhibit is one Tweet that could not possibly be  
25 construed -- I couldn't even read it -- couldn't possibly

1 PROCEEDINGS 31

2 be construed as being evidence that you're a QAnon  
3 follower.

4 THE COURT: Right. I'm just asking in terms of  
5 considering for purposes of the motion to dismiss my being  
6 able to at least look at those additional Tweets that the  
7 defendants have submitted.

8 MR. BISS: Judge, I disagree with Ms. Bolger. I  
9 don't think that it opens the door to have you review every  
10 single Tweet that Jack Flynn ever published.

11 THE COURT: Okay. But what about at a minimum the  
12 additional ones that Ms. Bolger has given me?

13 MR. BISS: Well, again, I mean, again, I think the  
14 Court is limited to what's in the complaint. And I don't  
15 believe that -- and you'll note in our opposition we  
16 footnoted in several places that we believe they went way  
17 past the four corners of the complaint. So, again, that's  
18 our position with regard to the proffer of additional  
19 information by her. I don't think it alters or changes the  
20 needle -- whatever that metaphor is with regard to the  
21 stage of the proceeding that we're at. But even if the  
22 Court does consider it at this stage of the proceeding, it  
23 doesn't change the nature of it.

24 THE COURT: So I was pushing Ms. Bolger on the  
25 substantial truth point and I was suggesting that she was

1 PROCEEDINGS 32  
2 conflating follower with association with affiliation.  
3 And, you know, I'm really wrestling with that on this  
4 motion and the posture that I'm in in which the Rhode  
5 Island cases say that defamation is a question for the  
6 Court but at the same time we're at the motion-to-dismiss  
7 stage and it's just the sufficiency of the pleading. So  
8 what can you tell me about -- even if I look at these  
9 Tweets, these other Tweets that CNN has pointed me to, how  
10 do I decide at this stage who is a follower or who is not a  
11 follower?

12 MR. BISS: Judge, I think the Court hit it right  
13 on the head. This broadcaster or segment, this special  
14 report, clearly identifies in a sort of a staccato multiple  
15 individuals who they all say are QAnon followers. And  
16 included in that snapshot are Jack and Leslie Flynn. And  
17 the Court has to look at the context in which it was  
18 published. This article was published February 4 -- I say  
19 "article" -- this broadcast, this segment -- if I keep  
20 saying article, it's only because I'm used to that.

21 THE COURT: That's okay. I understand what you  
22 mean.

23 MR. BISS: This publication was published on  
24 February 4, 2021, within a month of the storming of the  
25 Capitol. And I think, Judge, this whole idea about QAnon

1

PROCEEDINGS

33

2 being a violent extremist group, we didn't have that back  
3 in 2020. So the context of when this publication occurred  
4 is important because clearly Jack Flynn, when he re-Tweeted  
5 in 2020, there was no mention of QAnon being a violent  
6 extremist group. The FBI had not labeled them, the  
7 Department of Homeland Security had not labeled them.  
8 Other things we point to in the complaint are Congress --  
9 Congress passed a piece of legislation in October -- it's  
10 in a footnote, Judge, in the complaint.

11 THE COURT: Yes. I was actually thinking about  
12 the FBI report or the FBI designation. Do you know when  
13 that occurred?

14 MR. BISS: I don't, Judge. I don't know when that  
15 was, but I can find that out for your Honor. But it -- as  
16 the election loomed and as the election passed and the  
17 post-election events occurred, there became a sort of a  
18 fixation on this QAnon. And the FBI and Department of  
19 Homeland Security clearly labeled them as domestic  
20 terrorists. Now, that's a -- you don't want to be -- no  
21 one wants to be associated with that. And I would suggest  
22 to your Honor that I think Ms. Bolger said common sense and  
23 use the idea of common sense. And the Court doesn't -- of  
24 course, nobody -- courts, juries, don't ever give that up  
25 at the door. But if you think about using the Court's

1

PROCEEDINGS

34

2 common sense, if you were affiliated with a violent  
3 extremist group, Judge, that would be defamatory per se  
4 about the Court, about anybody, defamatory per se. The  
5 best case -- and it's an unfortunate case because it had  
6 to -- it went through an appeal in the Sixth Circuit. We  
7 cite it. It's *Boulger v. Woods* -- and that's B-o-u-l-g-e-  
8 r -- *versus Woods*. And James Woods, the actor who was  
9 active on Twitter till he got banned, published a  
10 statement -- I'll say it's a statement, and I'll tell you  
11 why the Sixth Circuit said it wasn't a statement. And the  
12 statement was that is Ms. Boulger, is that Ms. Boulger  
13 giving the Nazi salute. And he put a picture of what was  
14 putatively Ms. Boulger in the Tweet. It turned out it  
15 wasn't Ms. Boulger; it was somebody else. But Ms. Boulger  
16 was at a Trump rally, and she's a Democratic operative, and  
17 the Sixth Circuit Court of Appeals said that by simply  
18 associating her with somebody who would give the Nazi  
19 salute, that is capable of a defamatory meaning. And the  
20 case was eventually reversed by the Sixth Circuit because  
21 they found that, whether you agree with this or not, they  
22 found that Mr. Woods was not -- he didn't make a statement,  
23 he asked a question. And it would seem to me that's -- you  
24 know, again, whether we agree with that or don't agree with  
25 that, that's a different issue. But that case clearly

1

PROCEEDINGS

35

2 demonstrates that when you falsely associate somebody with  
3 an extremist group, there's no question it's capable of a  
4 defamatory meaning. We cite other cases in the brief, as  
5 well. And we allege material falsity throughout the brief.  
6 I mean, if the Court wants -- I think we cited it enough in  
7 our brief. And it's clearly materially false under the  
8 Masson standard, under the *Masson v. New Yorker* standard  
9 because they were not followers, they were never followers,  
10 and it's all alleged.

11 THE COURT: Can you talk a little bit more about  
12 the actual, how you believe you've sufficiently alleged  
13 actual malice? If CNN is right that Mr. Flynn is in fact  
14 at least a limited-purpose public figure and therefore  
15 needs to show actual malice, how have you alleged that?

16 MR. BISS: Judge, I think there's three ways that,  
17 three factual ways that we allege actual malice. And I  
18 believe this is -- these are all stated in paragraph 23 of  
19 the complaint -- but I'll highlight three because I think  
20 that each one of these independently provide a sufficient  
21 plausible basis to support a finding of actual malice at  
22 this stage.

23 And the one thing I have to say to the Court in  
24 these defamation cases is when the cases proceed past  
25 12(b)(6), you get to discover all sorts of other things,

1

PROCEEDINGS

36

2 you learn all sorts of things about how the reporters went  
3 about gathering their evidence and these types of things.  
4 And so the landscape changes dramatically when you go to  
5 discovery. There's things you don't know that they did,  
6 things you don't know that a source told them. You don't  
7 know if they had any sources. So they could tell you in  
8 the article or in the broadcast they got a source that says  
9 X. And sometimes it turns out they have no sources; they  
10 just make it up.

11 So in paragraph 23(a) we allege that they made it  
12 up. They made up that Jack Flynn and Leslie Flynn are  
13 QAnon followers. They just fabricated it; they made it up.  
14 And we say that the way they made it up -- the way they  
15 knew it was false is because they reviewed Jack Flynn's  
16 Tweets. And if they reviewed his Tweets, they would have  
17 saw that he was not a QAnon follower at all. And we give  
18 the Court multiple examples to show how the -- how a  
19 reasonable jury could conclude that he wasn't a follower at  
20 all.

21 Now, the one that Ms. Bolger sort of highlighted  
22 to the Court is on page 15 of the complaint, the amended  
23 complaint. And this is the Tweet where Jack Flynn is  
24 actually -- and I do have to concede, Judge, I don't use  
25 Twitter. So --

1

PROCEEDINGS

37

2

THE COURT: I don't, either.

3

MR. BISS: -- if I've got my terms all wrong, I just want to be clear. I don't use Twitter because I'm often involved in litigation with them. So this is the one where he either re-Tweets or attaches somebody else's Tweet from "Escape the Matrix," whatever that is, whoever that is. Jack Flynn writes -- and this is all Jack Flynn -- and you'll see, just to reiterate another issue about supporting your brother -- of course, Jack Flynn's profile picture is a picture of General Flynn, and Jack Flynn repeatedly changed his profile message: "Jack Flynn, we fight back." He had all sorts of different hashtags, all of which were intended by Jack Flynn to support his brother. And he writes, quote, "If this means you believe in the Constitution and equal justice under the law, then this works for me." And it has attached to it a re-Tweet from "Escape the Matrix" with a big letter Q on it. That's far from being a QAnon follower. That's -- the jury could look at that and say what this guy actually means here is that if you support -- if QAnon supports the Constitution and equal justice under the laws of America, then they're not a violent extremist group, they're not dangerous. But Jack Flynn -- this could not be construed as being somebody who follows the QAnon movement. In fact, it begins with an

1

PROCEEDINGS

38

2 "if." It begins with a question: "If this means."

3 So I would just suggest to your Honor that there  
4 is, number one is the allegation -- number one allegation  
5 on actual malice is that CNN, based on its review of Jack  
6 Flynn's Tweets, fabricated the claim that he was QAnon  
7 follower. And the reason that you want to bring the Flynns  
8 in in February of 2021 is because Michael Flynn is probably  
9 one of the most prominent supporters of Donald Trump and  
10 the Republican party. That's why -- why would they include  
11 the Flynns in this particular segment? Because they  
12 wanted -- they wanted to extend the -- they wanted to  
13 sensationalize the news and extend the reach of this. Not  
14 the Flynns, but CNN wanted to get more mileage out of  
15 General Flynn than this little barbecue video was intended  
16 for. So number one is the fabrication.

17 Number two, Judge -- and this is in 23(b) -- and  
18 23(a) is a long -- there's other things we allege in 23(a).  
19 They disregarded the Tweets of Sydney Powell, just  
20 intentionally disregarded them as to the meaning of the  
21 General Flynn video. Paragraph 23(b), in 23(b) we allege  
22 that they deliberately altered the General Flynn video, and  
23 we allege that they did it in such a way that they took out  
24 the oath to America, the oath to the Constitution that the  
25 Flynns took. And they also took out the "God Bless

1

PROCEEDINGS

39

2 America." And they left it with, "Where we go one, we go  
3 all." So what we allege in the complaint -- and this is  
4 also pointed out in our briefing papers -- the they created  
5 a false insinuation that the Flynns were pledging an oath  
6 of allegiance to QAnon. By omitting the words, "God Bless  
7 America," the oath to the Constitution, they created a  
8 false impression in the minds of readers that the Flynns  
9 had pledged an oath of allegiance to QAnon and were  
10 therefor QAnon followers. That's the second factual basis  
11 for actual malice is their alteration of the record.

12 Number three is -- and this is in paragraph 23(c)  
13 of the complaint -- and we allege that in the wake of the  
14 storming of the Capitol, the accusation that the Flynns  
15 were QAnon followers -- because remember that the context  
16 of this particular publication is within a month of the  
17 storming of the Capitol, CNN is in the midst of a  
18 multiple -- I was thinking multi-city tour of QAnon, but on  
19 January 31, Anderson Cooper publishes a massive QAnon  
20 conspiracy segment, they come out with another segment  
21 February 26, so they're in the process of publishing  
22 statements linking QAnon to the insurrectionists, the mob  
23 that stormed the Capitol. And so the third factual basis  
24 for our claim of actual malice is that CNN knew the  
25 publication would cause a media frenzy, and they

1

PROCEEDINGS

40

2 deliberately and recklessly conveyed the false narrative  
3 about the plaintiffs to sensationalize the news. Those are  
4 the exact same allegations in the *Tomlin* case that we cite.  
5 Obviously, it's not binding on your Honor; it's as Fourth  
6 Circuit case, but in that case the television station  
7 deliberately and recklessly published false statements in  
8 order to create a sensational story. And those allegations  
9 were sufficient for the Fourth Circuit to find that there  
10 was an issue of fact on summary judgment. And that's what  
11 they did here. In the midst of all this controversy that  
12 was occurring regarding the storming of the Capitol, the  
13 riots, the insurrection, whatever the appropriate word is,  
14 because it seems to change a lot, but whatever happened on  
15 January 6th. And I think we can safely say that there were  
16 multiple -- there was a storming of the United States  
17 Capitol building, there were people who invaded the United  
18 States Capitol building. They called it an insurrection  
19 and then I think a couple of weeks ago or a month ago,  
20 maybe, Reuters came out and said the FBI changed it, it  
21 wasn't an insurrection.

22

THE COURT: People died.

23

MR. BISS: People died. It was a serious, serious  
24 breach of national security. And likely there's going to  
25 be some serious -- and people have been arrested, people

1

PROCEEDINGS

41

2 have been convicted, people pled guilty, and there's likely  
3 to be much more fallout on those issues. But this  
4 particular article or publication we allege was published  
5 by CNN in order to sensationalize these issues at a time  
6 when they knew that they could get the most out of these  
7 articles by linking the Flynns to QAnon during this time.  
8 So it's those three pieces, Judge, that we allege support  
9 the claim of actual malice in this case.

10

And actual malice, of course, has -- there's two  
purposes for actual malice. Number one is if you find that  
Jack Flynn is a limited-purpose public figure, we  
acknowledge that he has to allege actual malice. And I  
acknowledge it, but I -- and I've made this argument in  
repeated cases -- I never expect to win on the argument,  
but we of course view *New York Times v. Sullivan* as bad  
law. I've asked every Court to reconsider it. And, for  
the record, I have to ask your Honor to reconsider it.

19

THE COURT: That's a long shot with me.

20

MR. BISS: No, I understand. And I say that with  
respect to the concept of *stare decisis*. But I have to  
preserve that issue. Some Court's going to consider it.  
The same arguments were made by Sarah Palin, I think, to  
Judge Rakoff; and, of course, he denied her motion, as  
well. But -- and I want to just say that for the record.

1

PROCEEDINGS

42

2 But the other part of actual malice is for punitive  
3 damages. So we have to -- in order for both Flynns or  
4 either Flynn to go to a jury on a claim of punitive  
5 damages, they do have to, under *Gertz*, they do have to  
6 satisfy or plead actual malice. And there's other -- in  
7 the complaint there's other aspects of actual malice that  
8 are talked about in here.

9           And I just want to touch on the bias issue. So  
10 it's a little more complicated than -- and with great  
11 respect to Ms. Bolger -- it's a little more complicated  
12 than just saying, "Well, bias can never be evidence of  
13 actual malice." Bias, ill will, spite can be evidence of  
14 actual malice -- there's the *Duffy* case in the Second  
15 Circuit, and there are numerous other cases -- when -- bias  
16 and ill will and spite can be evidence of actual malice  
17 when the article is published with the intent to inflict  
18 harm. And that's what we allege in the complaint. So it's  
19 not simply that bias has no relevance whatsoever to the  
20 actual malice inquiry; it does have relevance. And I would  
21 say this: The Second Circuit in the *Celle* case, C-e-l-l-e,  
22 case said that when a Court looks at actual malice, it's a  
23 cumulative process. Okay? So the Court doesn't just go,  
24 well, there's one factor or two factors; you look at all  
25 the factors overall, and if all the factors would plausibly

1

PROCEEDINGS

43

2 lead to the conclusion that the defendant knew the  
3 statements were false or acted with reckless disregard for  
4 the truth, then they've satisfied the 12(b) (6) standard.  
5 And I think, Judge, it is important in this case -- in  
6 every case -- although -- to understand -- and what the  
7 Second Circuit has said in *LaLiberte* and *Palin*, and that is  
8 that the allegations in the plaintiff's complaint have to  
9 be accepted as true. And the reasonable inferences at this  
10 stage have to be drawn in favor of allowing the case to go  
11 forward to discovery. And the policies reasons behind  
12 that -- we don't often talk about the policy reasons -- but  
13 the policy reasons are so that the Second Circuit has a  
14 well-developed record. As I said before, there are things  
15 that you learn about even award-winning journalists. And  
16 sometimes you learn things about award-winning journalists  
17 and only in discovery. So --

18 THE COURT: It's also a risk for the plaintiffs,  
19 though, too.

20 MR. BISS: It's also a risk for the plaintiffs,  
21 there's no question about that. So, I mean, there are  
22 enough issues in these cases. But that's the policy behind  
23 the *Igbal-Twombly* argument is that we want the courts of  
24 appeals to have a well-developed record, we want the  
25 parties to -- we want to -- not to use 12(b) (6) as a means

1 PROCEEDINGS 44  
2 of chilling litigation. So, again, Judge, we have -- I  
3 think I've addressed all the issues. I'll be happy to  
4 answer any --

5 THE COURT: You have. Just a couple of factual  
6 points I just wanted to confirm. So the video -- the clip  
7 that's the basis for the Flynns' claim is just the clip  
8 that's included in the February 3rd Donie O'Sullivan  
9 report? In other words, the video's not shown in the  
10 January 31st Anderson Cooper, it's not shown in the  
11 February 26th Anderson Cooper; it's just the February 3rd,  
12 right?

13 MR. BISS: That's correct. And, Judge, I think  
14 it's February 4, but --

15 THE COURT: February 4. I've seen it February 3rd  
16 and I've seen it February 4th a couple of different places,  
17 but --

18 MR. BISS: You're right. It's that -- it's what I  
19 call the "QAnon followers bit."

20 THE COURT: Right. Okay. And then if I could  
21 just ask you to tell me -- you know, we have the --  
22 Ms. Bolger handed up to me who is who in the photo from  
23 left to right. Obviously, I recognize General Flynn in the  
24 middle, but -- [Stopped talking.]

25 MR. BISS: Okay, so let's go -- we'll go left to

1 PROCEEDINGS

45

2 right?

3 THE COURT: Yes, sure.

4 MR. BISS: Okay. So on the far left is Mrs. Joe  
5 Flynn. And I apologize to the Court; I don't know Joe's  
6 wife's name.

7 THE COURT: It's not Jack's wife?

8 MR. BISS: No. Then there's Joe Flynn, General  
9 Flynn, General Flynn's wife, and then my clients are --

10 THE COURT: Okay, so your clients are on the far  
11 right, okay.

12 MR. BISS: My clients are on the far right.

13 THE COURT: Great. Thank you. Okay. Thank you,  
14 Mr. Biss.

15 MS. BOLGER: Your Honor, may I --

16 THE COURT: Yes, please do.

17 MS. BOLGER: So first of all, your Honor, the two  
18 cases whose names I embarrassingly could not remember --

19 THE COURT: Yes.

20 MS. BOLGER: -- the first is *In Re Yukos Oil*,  
21 which is a Southern District of New York case from 2006,  
22 2006 Westlaw 3026024.

23 THE COURT: Wait, wait. A little slower.

24 MS. BOLGER: Sorry, it's 2006 Westlaw 3026024.  
25 And, your Honor, that is the case that says, "This Court

1 PROCEEDINGS 46

2 need not accept as true any allegations that are  
3 contradicted by documents deemed to be part of the  
4 complaint or materials amendable to judicial notice."

5 THE COURT: Okay. Thank you.

6 MS. BOLGER: Relatedly, your Honor, the case I  
7 talked about in which Judge Abrams recognized Tweets not  
8 included in the complaint is *Ganksy v. Menson*, 480 F. Supp.  
9 3rd 542, Southern District of New York, from last year.  
10 And, your Honor, I do want to mention that if you put those  
11 two ideas together, there is no question that you should be  
12 taking judicial notice of the Jack Flynn Twitter feed in  
13 its entirety because not only does Jack Flynn rely on it by  
14 putting it in the complaint, but he actually suggests that  
15 somehow defendants magically knew of its entire existence,  
16 and that's why they acted with actual malice.

17 THE COURT: Okay. Thank you.

18 MS. BOLGER: I want to talk quickly about  
19 substantial truth. And your Honor I know is viewing this  
20 on a 12(b) (6) motion. First of all, your Honor, as I said,  
21 I think you can look at all of these documents on the  
22 12(b) (6) motion. But also, your Honor, the plaintiff is  
23 flatly wrong when he tells you I bear any burden on this  
24 motion. And that's what *Tannerite* and *Cabello v. Rondon* did  
25 in the Second Circuit. That's different from *LaLiberte* and

1

PROCEEDINGS

47

2 it's different from *Palin*. What *Tannerite* and *Cabello-Rondon*  
3 did was say that the plaintiff at the pleading stage bears  
4 the burden of proving facts that provide a plausible basis to  
5 believe the defendants engaged in wrongdoing.

6 So, your Honor, it's not just you can throw up some  
7 words out there; they have to plausibly plead facts that  
8 support the allegations of wrongdoing. And, your Honor, for  
9 all the reasons we say in our papers, including -- and, your  
10 Honor, I know that Mr. Biss dismisses it -- this is a giant  
11 letter Q with the words, "Where we go one, where we go  
12 all," that Jack Flynn chose to re-Tweet on August 21st and  
13 posted on his Twitter feed. And, in addition, on the  
14 14th -- I'm sorry -- Exhibit 14 -- 12, Jack Flynn re-  
15 Tweeted a Tweet that says, "QAnon is not violent or a  
16 conspiracy; we are everyday people seeking truth. I'm a  
17 family man. I'm educated and run my own business. I work  
18 hard and spend my spare time with my family. I enjoy golf  
19 and reading. QAnon. Share and tell your story." That's  
20 something Jack Flynn himself chose to re-Tweet under his  
21 own name on Twitter. If you look at the information posted  
22 on Twitter, it confirms that the Flynns will never be able  
23 to prove that this story is materially false on the  
24 *Tannerite* standard. *Tannerite* says it has to be the  
25 plaintiff that proves facts that are plausible. These

1

PROCEEDINGS

48

2 Tweets, which are clearly incorporated either in the  
3 complaint itself or by reference, make it impossible for  
4 the Flynns ever, ever to be able to get over that *Tannerite*  
5 standard.

6 And I wanted to mention two cases that are in our  
7 briefing.

8 THE COURT: Yes.

9 MS. BOLGER: One is the *Lovejoy* case, which is  
10 about an affiliation with the Nazis. And the other is the  
11 *Bustos* case, which is about affiliation with the Aryan  
12 Brotherhood. And, actually, I think the *Lovejoy* case is  
13 helpful. The *Lovejoy* case is actually from 1948. In 1940  
14 it was really bad to be called a Nazi, just as in February  
15 of 2021, the plaintiff is alleging it was worse to be QAnon  
16 than it was when Jack Flynn voluntarily associated himself  
17 with it in July. Right? What the *Lovejoy* case says is  
18 even if you don't want to be associated with the Nazis now,  
19 you yourself said you appreciated the German army and think  
20 they treated our troops well. You associated yourself with  
21 the Nazis. Even if they got worse or even if you don't  
22 agree with them now, you stood up to be counted. And they  
23 said that in 1948 -- right? -- the same time difference.  
24 So I think *Lovejoy* is really important here.

25 I don't quite understand the timeliness issue. If

1

PROCEEDINGS

49

2 someone endorses Q in July of 2020, they endorse -- then it  
3 is substantially true for all purposes. You don't --  
4 there's no timeliness on the substantial truth requirement.  
5 And, your Honor, of course, Jack Flynn disabled his Twitter  
6 account, so we don't have anything after January 8th. But  
7 he was Tweeting supportive things for QAnon throughout  
8 2020.

9

And I do want to say, your Honor, a couple of  
10 things about actual malice and the fact that Jack Flynn  
11 actually re-Tweeted this video itself. First of all,  
12 there's no case that I know of that says it's negligent per  
13 se not to call for comment. I don't think that case  
14 exists. But, your Honor, if CNN had looked in the world to  
15 see what Jack Flynn and Leslie Flynn said about QAnon, what  
16 they would have found was the video Jack Flynn Tweeted  
17 himself saying take the oath; they would have found a  
18 massive letter Q with the words, "Where we go one, where we  
19 go all"; they would have found in Exhibit 12 a picture that  
20 he Tweeted out of his brother saying, "The Great  
21 Awakening," which is another QAnon slogan. No amount of  
22 diligence or lack of diligence would have changed what CNN  
23 said because it would have confirmed the truth of what they  
24 published.

25

I'm a little all over the map, so let me talk

1 PROCEEDINGS 50  
2 briefly about the other arguments he made about actual  
3 malice. The first is he says CNN made it up. That  
4 allegation's obviously not enough to satisfy the *Iqbal*  
5 plausibility standard. You would need facts that support  
6 the conclusion that they made it up.

7           In addition, he says they edited the video. Well,  
8 editing a video is actually editorial choice. That's  
9 protected under the First Amendment. That's a case called  
10 *Miami Herald v. Turnillo*. Plaintiff would have had to have  
11 pled facts that supported the allegation that that was done  
12 maliciously to be actual malice. Right? He would have had  
13 to plead some facts.

14           In addition, the idea that he claimed that it was  
15 sensationalized, one, he would need facts to support that  
16 as in, you know, on this day so-and-so did this thing that  
17 made it sensationalized. And more than that,  
18 sensationalizing the news is not evidence of actual malice.  
19 That's the *Kipper* case in the New York Court of Appeals.

20 And the last is, your Honor, I didn't say bias  
21 could never be calculated in actual malice. I said  
22 political bias cannot be. And, your Honor, all they allege  
23 in the complaint is that CNN are Democrats, so they made  
24 this up. And, your Honor, that is directly rejected in the  
25 Arapaho case and in the Dershowitz case in the Southern

1 PROCEEDINGS

51

2 District of Florida.

3 THE COURT: Okay.

4 MS. BOLGER: Last thing, last topic, I guess, is  
5 the defamation per se and special damages. *Gertz* has  
6 nothing to do with special damages. So what *Gertz* did was  
7 talk about actual damages.

8 THE COURT: Right.

9 MS. BOLGER: Actual damages are not special  
10 damages under Rhode Island law. The law is real clear in  
11 Rhode Island, and it's not what Mr. Biss just articulated,  
12 although he did describe *Gertz*'s actual damages analysis.  
13 In Rhode Island defamation per se -- you have to plead  
14 defamation per se, which has to have a business injury. If  
15 you don't do that, you must plead actual economic damages.  
16 And that's the *Sequin* case in our brief. And, your Honor,  
17 that's the words, "actual economic damages." So emotional  
18 damages aren't actual damages, and *Gertz* can't change that.  
19 Right? The *Sequin* case establishes the Rhode Island  
20 special damages requirement that the plaintiff hasn't  
21 satisfied.

22 And, your Honor, the discussion of death threats  
23 kind of brings to mind what really is the problem here.  
24 There's no reason to believe that Mr. Flynn got death  
25 threats when CNN published it but not when he published it,

1 PROCEEDINGS 52

2 right? Jack Flynn published to the world that he said  
3 [indiscernible], "Where we go one," and "God Bless  
4 America." He published that to the world. Those are his  
5 words. CNN didn't even repeat that but showed a clip of  
6 that footage. It's the same thing. It can't defame him  
7 when CNN does it but not defame him when he not only Tweets  
8 it but asks for it to be re-Tweeted and consistently re-  
9 Tweets Sydney Powell talking about how we should all take  
10 the oath. It's Mr. Flynn's words re-Tweeted over and over  
11 because he was promoting that he took the oath. It is not  
12 defamatory when CNN truthfully publishes what Mr. Flynn  
13 did.

14 THE COURT: Can we talk about the *Bustos* case for  
15 a second? I've spent some time looking at that. You  
16 mentioned it earlier.

17 MS. BOLGER: Yes.

18 THE COURT: So there, you know, Justice Gorsuch,  
19 when he was sitting on the Tenth Circuit, looked at what --  
20 similar to this case in some ways, where the inmate, the  
21 plaintiff in that case, was shown in a video that was  
22 talking about the Aryan Brotherhood, and he alleged, well,  
23 I'm not part of the Aryan Brotherhood. And what Justice  
24 Gorsuch focused on was, well, you say that, but you sent  
25 them letters and you took heroin from them and you praised

1

PROCEEDINGS

53

2 them, and all those other things. So those were kind of  
3 what Justice Gorsuch was focusing on was specific acts.  
4 What I don't see here, aside from Tweeting, which obviously  
5 is -- it is an act, but it's more of a statement -- I don't  
6 see any -- there's no allegations -- and CNN hasn't pointed  
7 to anything, although this may be the sort of thing that  
8 will come out in discovery, them going to QAnon meetings or  
9 going to rallies or being there on January 6th or anything  
10 like that that takes the step farther from just Tweets.  
11 And so that to me seemed to be a difference between *Bustos*  
12 and this case. And it was at a different posture, too, I  
13 think, but -- [Stopped talking.]

14

MS. BOLGER: So I actually disagree with your  
15 Honor. So, first of all, it is a different posture. But  
16 there's a reason it's a different posture. Right? So it  
17 was after summary judgment -- it is a summary judgment.  
18 But, your Honor, *Tannerite* didn't exist at the time, and  
19 *Tannerite* didn't govern *Bustos*. Right? I'm suggesting,  
20 your Honor, because it's the law, that *Tannerite* and  
21 *Cabello* are different in New York, in the Second Circuit.  
22 Right? We have an explicit requirement that the Second  
23 Circuit has been very clear that you must at the pleading  
24 stage plausibly allege facts that support the inference.  
25 Right? So *Tannerite* governs --

1

PROCEEDINGS

54

2

THE COURT: We're in Rhode Island, though. Does  
that still govern?

4

MS. BOLGER: Well, you're not in Rhode Island.

5

THE COURT: Well, but it's Rhode Island law that  
we're applying, so do I have to follow what the Second  
Circuit --

8

MS. BOLGER: I think you would have to follow  
Second Circuit on the standard of care required to get over  
a 12(b)(6) motion, yes, your Honor.

11

THE COURT: Well, on 12(b)(6), yes. But on --

12

MS. BOLGER: That's what *Tannerite* and *Cabello*  
are about; they're the standard you must show, what you  
must allege on a 12(b)(6) motion. That is what *Tannerite*  
and *Cabello* are about. Right? So, yes, your Honor, I do  
think they govern.

17

But the other thing is -- the difference, I think,  
between *Bustos* and here is that the allegations in the  
complaint -- so the only reason that the plaintiffs have  
had to acknowledge the existence of these Tweets is because  
I wrote them a Rule 11 letter attaching them. Right, your  
Honor, every single one of those Tweets is in this  
complaint because I said to the plaintiff, Go back and look  
at your Twitter feed, because you're supporting QAnon.  
That's how they got into the complaint. And you can see

1 PROCEEDINGS 55

2 that by comparing the first complaint and the second  
3 complaint.

4           The plaintiff is the person who has said if you  
5 look at my Twitter feed, you would see I was pellucidly  
6 innocent. Right? That's in the complaint itself. And I  
7 think that's different than *Bustos*. *Bustos* was talking  
8 about things that could only be discovered in discovery.  
9 They weren't talking about the things that were actually  
10 integral to the complaint itself. The plaintiff has put  
11 into issue what he said on Twitter. And that should be  
12 enough to undercut his ability to carry his burden under  
13 *Tannerite*. Right? He's got the burden of pleading facts  
14 that prove falsity. He has said his Twitter feed makes him  
15 pellucidly innocent. But that's not right.

16           THE COURT: Right. But, obviously, *Bustos* got  
17 past the motion to dismiss and got to discovery, and it  
18 went to summary judgment.

19           MS. BOLGER: We don't even know if there was a  
20 motion to dismiss, your Honor.

21           THE COURT: Well, okay, he got past the pleading  
22 stage, so --

23           MS. BOLGER: But *Tannerite* didn't exist, right,  
24 your Honor? So that's one thing. And the other thing is I  
25 guess he got past the pleading stage, your Honor, but I

1 PROCEEDINGS 56

2 don't know if there was even a motion.

3 THE COURT: All right, okay. Anything else?

4 MS. BOLGER: Oh, the other thing, of course, is  
5 that there's nothing in the report that talks about the  
6 words "extremism" or "violence" or "insurrection" or any of  
7 those words are not actually in the reports. What the  
8 plaintiff is doing is imposing them from that Anderson  
9 Cooper discussion on January 31st. But, of course, they're  
10 not in the report --

11 THE COURT: Well, they don't say that, but there  
12 are pictures of the riot on January 6th. There's about a  
13 minute of footage of January 6th in the video.

14 MS. BOLGER: But they certainly don't call the  
15 plaintiffs extremists or violent or racist in an overt way  
16 in the report. The words just aren't there.

17 THE COURT: The words aren't there, but I mean,  
18 the images are there.

19 MS. BOLGER: The images don't include the  
20 plaintiffs, your Honor.

21 THE COURT: It's a three-minute video. The  
22 plaintiffs are in the video, and there's a minute of  
23 January 6th in there. It's hard to parse that out.

24 MS. BOLGER: I think that actually the  
25 requirement that you parse the report as a whole means that

1

## PROCEEDINGS

57

2 you can't just say well, because their image is there, it's  
3 calling them everything in the video. Right? You're  
4 required to parse what the video actually says about the  
5 plaintiff as opposed to the video. That's --

6 THE COURT: But the picture is there, and it says  
7 "QAnon follower" below it. You keep switching back and  
8 forth. One minute you want me to look at the whole video;  
9 the next minute you want me to only look at what was --

10

MS. BOLGER: We want you to look at the whole  
11 video, your Honor. I always want you to look at the whole  
12 video. I want you to look at the whole video because, one,  
13 you're required to under the law that says that you're  
14 required to do that, *Mann v. Abel*, right? That's the --  
15 and the *Bray* case. That is the rule; you are required to  
16 look at the whole video. But the of-and-concerning  
17 analysis looks to whether the defamatory statements are of  
18 and concerning the plaintiff. It's not whether the  
19 plaintiff is just in the video; it's what the video says  
20 about the plaintiff. And I would argue, your Honor -- and  
21 I know I'm not convincing you -- that the video only -- the  
22 only thing the video says about the plaintiffs is that they  
23 were standing next to Michael Flynn, nothing else.

24

THE COURT: All right, yes, you're right; you're  
25 not convincing me on that.

1 PROCEEDINGS 58

2 Mr. Biss, any last word before we wrap up?

3 MR. BISS: No, your Honor.

4 THE COURT: Okay. Could I ask the parties to  
5 please order a transcript of today's argument and get that  
6 to me as soon as possible? We'd like to get a decision out  
7 to you shortly.

8 MS. BOLGER: Certainly, your Honor.

9 THE COURT: And I don't know if there -- I think  
10 the cases that you mentioned you either gave me the cites,  
11 but if there are any other cites that you want me to  
12 consider, just -- on Monday just submit a letter with any  
13 cites that either side --

14 MS. BOLGER: Your Honor, I happen to have all of  
15 the case -- many of the cases --

16 THE COURT: Perfect. I have them all --

17 MS. BOLGER: -- if you want --

18 THE COURT: No. I have them all. Thank you.

19 So either of you, if there are any other cases  
20 that you mentioned or you think of after this, just get  
21 those to me by Monday. Okay?

22 All right. Thank you, both. We're adjourned for  
23 today. Have a good afternoon.

24 (Whereupon, the matter is adjourned.)

25

1

59

2

3 C E R T I F I C A T E

4

5 I, Carole Ludwig, certify that the foregoing  
6 transcript of proceedings in the case of Flynn et al v.  
7 Cable News Network, Inc., Docket #21-cv-02587-GHW-SLC, was  
8 prepared using digital transcription software and is a true  
9 and accurate record of the proceedings.

10

11

12

13

Signature

14

Carole Ludwig

15

Date: October 18, 2021

16

17

18

19

20

21

22

23

24

25